U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 28Mar2001

CASE NO. 1999-BLA-703

In the Matter of

MARTHA R. WARD Survivor of DONALD E. WARD,
Claimant

v.

VALLEY CAMP COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Martha Ward
Appearing Pro Se

Mary Rich Maloy, Esq.
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("Act"), filed on February 2, 1999. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;

2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,

3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers pneumoconiosis" or "CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed the instant survivor's claim, on June 10, 1998 (Director's Exhibit "DX" 1).[1] On November 24, 1998, the Department of Labor issued an initial finding that the evidence did not show that pneumoconiosis caused the miner's death (DX 28). The claimant, through counsel, requested a formal hearing on December 22, 1998 (DX 26).

The case was referred to the Office of Administrative Law Judges by the Director for a formal hearing on March 13, 1999. (DX 40). By letter dated April 26, 1999, Claimant's counsel withdrew from this matter. On June 9, 1999, Administrative Law Judge Gerald M. Tierney issued a Notice of Hearing and a letter advising Claimant of her rights regarding representation in black lung claims. By Order of Continuance dated August 13, 1999, Judge Tierney noted Claimant came to the hearing and requested a continuance to retain counsel. Judge Tierney granted the request for continuance. A Notice of Hearing dated October 29, 1999, was then issued by Administrative Law Judge Daniel L. Leland. Following receipt of a letter from Claimant which stated she had suffered a recent stroke, Judge Leland continued the matter by Order dated February 9, 2000.

Judge Leland issued a second notice of hearing on May 3, 2000 scheduling the case for a hearing on July 26, 2000. At the hearing, Claimant failed to appear and subsequently, Judge Leland issued an Order to Show Cause why the case should not be dismissed on July 28, 2000. By letter dated July 28, 2000, Claimant stated she had a recent stroke and on the morning of the hearing her blood pressure was elevated and her feet were swollen. Judge Leland found good cause had been established for Claimant's absence at the hearing and he continued the case by Order dated August 2, 2000. The case was reassigned to me and a Notice of Hearing was issued on September 6, 2000.

On December 5, 2000, I held a hearing in Charleston, West Virginia, at which the claimant appeared without counsel and employer was represented by counsel. After discussing with the claimant her

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[1] The record of the claimant husband's previous claims are contained in DX 38 and DX 39. The miner filed his first claim for federal black lung benefits on May 20, 1981. That claim was denied by the Department of Labor claims examiner on March 16, 1982 (DX 38). There is no record of appeal of that decision, or request for formal hearing on that decision, thus, the prior denial is final. The miner, Claimant's deceased husband, filed a second claim for benefits on March 13, 1990. That claim was also denied by the Department of Labor claims examiner on September 7, 1990 (DX 39). There is no record of appeal of that decision, or a request for formal hearing on that decision, thus, that prior denial is also final.

right to counsel as well as her rights in representing herself, she waived her right to have a lawyer and proceeded with the hearing (TR 7 - 17). The parties were afforded the full opportunity to present evidence and argument. Director's exhibits ("DX") 1 through 42 and Employer's Exhibits ("EX") 1 through 8 were admitted into the record without objection. The abbreviation "TR" denotes transcript of the hearing. Post-hearing, the employer submitted a closing brief.

ISSUES[2]

I. Whether the deceased miner had pneumoconiosis as defined by the Act and the Regulations?

II. Whether the deceased miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the deceased miner's death was due to pneumoconiosis?

IV. Whether the named employer is the Responsible Operator?

FINDINGS OF FACT

I. Background

A. Coal Miner[3]

The record (including social security earnings records, and other documentary evidence) reflects that claimant's deceased husband was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for 14 1/2 years. (DX 3 through 12).

B. Date of Filing

The claimant filed this claim for survivor's benefits under the Act on June 10, 1998 (DX 1). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

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[2] DX 29-34; TR 6-8. Employer has stipulated to all issues except the medical issues. Specifically Employer stipulated that the claim was timely filed, that claimant's deceased husband was a miner for more than 30 years, that he worked as a miner after December 31, 1969, that claimant is the eligible survivor of the deceased miner, that the named Employer is the Responsible Operator, that the named Employer has secured the payment of benefits and all other issues as listed on Form CM 1025 (DX 29-34).

[3] The claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984).

C. Responsible Operator

The employer contests its designation as responsible operator. The deceased miner last worked as a coal trucker for Keenan Trucking Co., Inc. ("Keenan Trucking") from 1980 through 1984 (DX 11). The Director, however, contends that Keenan Trucking was not insured for black lung benefits (DX 27) and Keenan Trucking is no longer in business (DX 2, 11, 12, 13, 27). In addition, the Director contends that Keenan Trucking has outstanding judgments and liens totaling over $400,000 (DX 42). Thus, the Director argues that Keenan Trucking is not financially capable of paying benefits and, therefore, would not meet the definition of a responsible operator under 20 C.F.R. §725.492(a)(4).

The Director further argues that Valley Camp Coal Co. ("Valley Camp") is the last coal mine employer for whom the deceased miner worked at least one cumulative year prior to Keenan Trucking. The evidence establishes that the deceased miner worked for Valley Camp from: August, 1946 through November, 1948; March, 1970 through September, 1970; and, finally, from October 17, 1979 through October 31, 1979 (DX 8).

The named Employer does not contest that it was the operator where the deceased miner worked for a cumulative period of one year prior to his employment with Keenan Trucking. Rather, the Employer contends that the Director's arguments that Keenan Trucking does not meet the definition of a responsible operator since it is not financially capable of paying benefits should be rejected. Employer argues that the Director failed to investigate the financial status of the corporate officers of Keenan Trucking in determining if that employer was financially capable of paying benefits.

In *Lester v. Mack Coal Co.*, 21 B.L.R. 1-126 (1999) (en banc on recon.), the Benefits Review Board considered whether the pursuit of corporate officer liability of an uninsured responsible operator was appropriate under the regulations. The Board held, however, that § 725.495(a), which provides that the president, secretary, and treasurer of an uninsured employer shall be jointly liable for the payment of any benefits, "cannot be used to modify the definition of responsible operator to include corporate officers." The Board noted that responsible operator provisions at § 725.491(c)(2)(i) provide that an individual may be held liable as a responsible operator if s/he is a sole proprietor, a partner in a partnership, or a member of a family business. There is no evidence in this case that Keenan Trucking was a sole proprietorship, a partnership or a family business. Rather, the evidence cited by the Director establishes that the corporation, Keenan Trucking has ceased to exist and, furthermore, has extensive liens and judgements assessed against it. Under these circumstances, the Director correctly concluded that Keenan Trucking is not financially liable and, therefore, properly named the next most recent operator with whom the deceased miner worked a cumulative year in coal mine employment as the responsible operator in this case. As noted above, the evidence establishes that operator to be the named employer, Valley Camp. Accordingly, I find that Valley Camp Coal Co. is the properly designated responsible coal mine operator in this case, under Subpart F, Part 25 of the Regulations.

D. Dependents and Survivorship

I find the claimant was a dependent of the deceased miner. Accordingly, she is an eligible survivor of the miner for purposes of filing this claim for survivor's benefits under the Act. (DX 19, 20).

E. Personal, Employment and Smoking History

The miner was born on January 21, 1927 and had a ninth-grade education. (DX 1, 38 and 39). It is established that the deceased miner worked in the coal mines for 14 1/2 years. According to his most recent application for living miner's benefits, he stopped working in the mines in 1984 when he became disabled (DX 39). His last job in the mines was a truck driver and loader operator (DX 39). Mrs. Ward and her daughter, Ms. Keeney, testified that when the deceased miner was laid off with Keenan Trucking he could not pass a physical to return to work for "recall" (Tr. 24). Mr. Ward received a 15% disability award from the Workmen's Compensation Fund of West Virginia on August 27, 1985 (DX 16).

Mr. Ward reported in a recent medical examination that he had breathing problems such as daily sputum, wheezing, dyspnea and cough. He also reported a smoking history of 15 years of 3/4 package of cigarettes daily (DX 39).

Mrs. Ward and Ms. Keeney testified that the deceased miner was treated for lung cancer in 1997. Ms. Keeney stated that following a lobectomy in 1997, the physicians told them they could not distinguish between the spots from lung cancer and from coal mine dust exposure (Tr. 29-30). The miner died on April 16, 1998 and he was 70 years old at that time (Tr. 35).

II. Medical Evidence[4]

A. Chest X-rays

There were seven readings of five plain view chest x-rays submitted, the majority of which are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102 (b).

Exh. #	**Dates** **1. x-ray** **2. read**	**Physician**	**Qualific-ations**	**Quality**	**Classif-ication**	**Interpretation or Impression**
DX 38	02-25-82 02-27-82	Gaziano	B, BCP	1	0/0	completely negative
DX 39	03-29-90 03-29-90	Kugel	BCR	1	0/0	no pneumoconiosis

[4] Because the miner did not have a formal hearing on his prior claims, and significant medical evidence has been developed since the prior claims, all medical evidence in the present record is listed herein for determining whether the claimant has established her survivor's claim.

Exh. #	Dates 1. x-ray 2. read	Physician	Qualific-ations	Quality	Classif-ication	Interpretation or Impression
DX 39	03-29-90 04-21-90	Gaziano	B, BCP	2	0/0	no pneumoconiosis
DX 22	11-07-97 11-07-97	Church	not stated	not stated	not stated	possible phrenic nerve paralysis
DX 22	11-07-97 02-23-99	Wiot	BCR, B	1	0/0	no pneumoconiosis

* A- A-reader; B- B-reader; BCR- Board-Certified Radiologist; BCP-Board-Certified Pulmonologist; BCI= Board-Certified Internal Medicine. Readers who are board-certified radiologists and/ or B-readers are classified as the most qualified. B-readers need not be radiologists.

** The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest x-ray classified as category 0, including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983); *Billings v. Harlan #4 Coal Co.*, B.R.B. No. 94-3721 (June 19, 1997) (unpub). If no categories are chosen in box 2B of the x-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. C-T Scans

In addition to the x-ray reports listed above, the record also included the following CT Scan reports:

Exh. #	Dates 1. x-ray 2. read	Physician	Qualific-ations	Interpretation or Impression
DX 37	02-19-97 02-19-97	Davis	not listed	Density mass in the left upper lobe, suspect carcinoma; vascular calcification; and cholelithiasis.
DX 23	02-19-97 02-23-99	Wiot	BCR, B	No evidence of pneumoconiosis. Right upper lung, ill defined strandy area compatible with old tuberculosis. Left upper lobe, mass which is most consistent with bronchogenic carcinoma

C. Pulmonary Function Studies

Pulmonary Function Tests are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician Date Exh.#	Age Height[1]	FEV_1	MVV	FVC	Tra-cings*	Compre-hension Cooper-ation	Qualify ** Conform* **	Dr.'s Impression
Gaziano 2/25/82 DX 38	55 68"	3.20	114	4.30	yes	good	Yes No	No comments
Walker 03/29/90 DX 39	63 67"	3.00	122	4.28	yes	not stated	Yes No	No comments

* A Judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-83 (1984).

** A "**qualifying"** pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.
*** A study "**conforms**" if it complies with applicable quality standards (found in 20 C.F.R. § 718.103(b) and (c)). (*see Old Ben Coal Co. v. Battram*, 7 F.3d. 1273, 1276 (7th Cir. 1993)). A judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

For a miner of the deceased miner's height of 67 inches, § 718.204(c)(1) requires an FEV_1 equal to or less than 1.89 for a male 55 years of age and an FEV_1 equal to or less than 1.76 for a male 63 years of age. [5] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.26 for a male 55 years of age and 2.43 for a male 63 years of age; or an MVV equal to or less than 73 for a male 55 years of age and less than 69 for a male 63 years of age; or a ratio equal to or less than 55% when the results of the FEV1 test are divided by the results of the FVC test. The FEV_1/FVC ratio requirement remains constant.

D. Arterial Blood Gas Studies[6]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise.

[5] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 43 F.3d 3 (4th Cir. 1995). Because the miner's height was most recently recorded at 67," I hold this to be his true height. Thus, I consider the miner to be 67" tall. Any discrepancy in the listed heights does not affect whether the tests are qualifying.

[6] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. § 718.204(b)(2)(ii) permits the use of such studies to establish "total disability." It provides:
In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability: . . .
(ii) Arterial blood gas tests show the values listed in Appendix C to this part . . .

Date Ex.#	Physician	pCO_2	pO_2	Qualify	Physician Impression
03/29/90 DX 39	Walker	41	83	No	
11/07/97 DX 36	none listed	41	76	No	

A lower level of oxygen (O2) compared to carbon dioxide in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

E. Physicians' Reports

Dr. D. Gaziano, a pulmonary specialist, examined the miner on February 25, 1982. Dr. Gaziano reported normal findings on physical examination and he reviewed the results of chest x-ray, pulmonary function study and blood gas study. Dr. Gaziano concluded there was no cardiopulmonary diagnosis and no diagnosis related to coal mine employment (DX 38).

Dr. J. Walker, whose credentials are not of record, performed an examination on March 29, 1990 which he recorded in a report dated April 11, 1990. Dr. Walker noted the miner's complaints, he reported an increased AP diameter on physical examination of the miner's chest, with normal findings on palpation and hyperresonance to percussion. Dr. Walker also reported suppressed breath sounds on auscultation. Dr. Walker reviewed a chest x-ray film, pulmonary function study results and blood gas study results. Dr. Walker diagnosed mild chronic obstructive pulmonary disease due to possible cigarette smoking and coal mine dust exposure, however, he concluded the miner was not prevented from performing his ususal coal mine employment by the diagnosed condition (DX 39).

Dr. Walker and other physicians examined the miner on August 27, 1985 on behalf of the West Virginia Workmen's Compensation Board. These physicians reported the miner was in fair general condition. No exercise tolerance test was performed because of the miner's back and leg pain due to arthritis. The physicians reviewed results of chest x-ray films taken on August 26, 1985, November 20, 1980 and August 27, 1981 as well as a film taken on August 27, 1985. They approved a 15% pulmonary functional impairment due to occupational pneumoconiosis (DX 16).

Various medical records from the miner's treatment for lung cancer in 1997 were included in the record. These records establish the miner had a fiberoptic bronchoscopy on March 7, 1997 which showed a mass in the left upper lung as reported by Dr. Figueroa. On March 13, 1997, Dr. Figueroa reported the left thoractomy showed evidence of adenocarcinoma in the upper lobe of the left lung with a mass in the posterior aspect and some puckering of the surface of the lung. Dr. Figueroa also reported some anthracotic hilar lymph nodes which were excised for pathology (DX 36).

In a pathology report dated March 13, 1997, Dr. Huang reported the left upper lung mass showed poorly differentiated adenocarcinoma as well as anthracosis in peribronchial lymph nodes. Dr. Huang stated there was mild emphysematous and anthracotic changes in the non-tumorous portions of the miner's lung. Dr. Huang also reported the hilar lymph nodes showed anthracotic changes and the intralobular lymph nodes showed anthracotic changes (DX 24).

Other medical records indicate the miner was treated with chemotherapy in December, 1997 and other tests showed metastasis to the bones, liver, and both adrenal glands (DX 36). The miner was treated at the Emergency Room for confusion in January, 1998 and was hospitalized for dehydration from April 12 to 13, 1998 (DX 36). The miner died on April 16, 1998 at home. The death certificate, signed by Dr. J. Shinwai, lists the cause of death as lung cancer with metastasis and severe cachexia. The death certificate listed coronary artery disease and chronic obstructive pulmonary disease as other significant conditions (DX 21).

On February 1,1999, Dr. R. Naeye, a board certified pathologist, examined the lung slides from the March, 1997 lobectomy and various medical evidence, on behalf of the Employer. Dr. Naeye noted a small amount of black pigment was present, however, it was in amounts too small to be called anthracotic micronodules. Dr. Naeye also reported there was no fibrosis, no tiny birefringent crystals or focal emphysema. Thus, Dr. Naeye stated these findings did not meet the criteria for coal workers' pneumoconiosis. He also reported masses of poorly differentiated adenocarcinoma and centrilobular emphysema were present. Dr. Naeye concluded that coal workers' pneumoconiosis was not present, so it did not play any role in the miner's death (EX 1). On April 3, 1999, after reviewing additional evidence, Dr. Naeye affirmed his opinion that coal workers' pneumoconiosis was not present and, therefore, the miner had no disability due to pneumoconiosis nor was his death caused by or contributed to by pneumoconiosis. Dr. Naeye stated the miner's death was due to carcinoma of the lung which is often due to a history of cigarette smoking. Dr. Naeye he included citations to medical authorities in support of this statement (EX 4).

Dr. J. Kleinerman, a board certified pathologist, reviewed the medical records and the lung slides on February 24, 1999 on behalf of the Employer. Dr. Kleinerman stated the slides showed a small number of macules of coal workers' pneumoconiosis, adenocarcinoma, centriacinar emphysema and chronic bronchitis. He stated the lymph nodes showed deposits of black granular pigment, but no fibrosis or metastasises. Dr. Kleinerman concluded the small number of macules present were coal workers' pneumoconiosis, however, based on the one blood gas study he reviewed, he found no evidence of any pulmonary or respiratory impairment. Dr. Kleinerman further concluded that the miner's lung cancer was due to cigarettes and not his coal dust exposure, and he cited numerous medical authorities in support of this conclusion (EX 2). On April 8, 1999, Dr. Kleinerman reviewed additional medical evidence which he stated did not change his opinion that there were a small number of macules of coal workers' pneumoconiosis present, but there was no complicated coal workers' pneumoconiosis present. In addition, he restated his opinion the miner's lung cancer caused his death and the lung cancer was not related to the miner's coal mine employment or coal workers' pneumoconiosis (EX 4).

At a deposition taken on August 2, 1999, Dr. Kleinerman reiterated many of his written findings. He stated further that the medical authorities around the world agree that coal mine dust exposure is not related to lung cancer. He also stated that his opinion the miner's pneumoconiosis did not contribute to his death is based on the small number of macules seen pathologically which would not cause any impairment in pulmonary function and the results of the pulmonary function studies which showed no evidence of a restrictive lung disease. Dr. Kleinerman stated the miner would have died at the same time in the same manner if he had never worked in coal mine employment (EX 8).

On March 8, 1999, Dr. G. Hutchins, a board certified pathologist, reviewed the lung slides and the medical records on behalf of the employer. Dr. Hutchins stated the slides showed a mild degree of simple coal workers' pneumoconiosis, adenocarcinoma, centrilobular emphysema, and chronic bronchitis. Dr. Hutchins concluded the mild degree of simple coal workers pneumoconiosis present was not of a severity to cause respiratory impairment or disability nor could it cause or hasten the miner's death. Dr. Hutchins further stated the pulmonary disability present was due to chronic obstructive pulmonary disease. The non-small cell carcinoma of the lung had metastasized, caused the miner's disability and caused the miner's death. The chronic obstructive lung disease and lung cancer present were due to the miner's history of cigarette smoking. Dr. Hutchins stated the miner would have died at the same time without any coal mine employment (EX 3).

Dr. P. Caffery, a board certified pathologist, reviewed the evidence on April 7, 1999 on behalf of the employer. Dr. Caffery noted the miner had an employment history of 25 years in coal mine employment. He also noted a smoking history. Dr. Caffery concluded the miner had a minimal degree of simple coal workers' pneumoconiosis present, but no pulmonary or respiratory impairment. Dr. Caffery further concluded the coal workers' pneumoconiosis present did not cause or hasten the miner's death. The cause of death was adenocarcinoma of the lung which was probably due to smoking based on extensive medical literature (EX 4).

Dr. J. Castle, a pulmonary specialists, reviewed the records on May 4, 1999, on behalf of the employer. Dr. Castle concluded there was pathologic evidence of mild simple coal workers' pneumoconiosis, however, it was so minimal it did not appear on either chest x-ray or CT lung scan tests. Dr. Castle stated the miner had no clinical abnormality due to this pathological pneumoconiosis since there were no findings on physical examination or physiologic testing. The miner was disabled by metastatic bronchogenic carcinoma which was unrelated to his coal mine employment. Dr. Castle discussed the medical literature which he stated shows that cancer is not caused by or contributed to by coal mine dust exposure or coal workers' pneumoconiosis (EX 5) At a deposition taken on July 28, 1999, he further stated the pathological evidence of pneumoconiosis was so mild any airway obstruction was due to the miner's history of cigarette smoking and no coal dust exposure. He further concluded the miner's death was due to lung carcinoma (EX 7).

Dr. G. Zaldivar, a pulmonary specialist, reviewed the medical records on July 7, 1999 on behalf of Employer. Dr. Zaldivar noted normal pulmonary function results until the miner was found to have cancer. He also stated there was objective evidence of coal worker's pneumoconiosis, however, he noted until the diagnosis of metastatic lung cancer, there was no evidence of any pulmonary nor respiratory impairment. Prior to the diagnosis of lung cancer, the miner was capable of doing his usual coal mine employment, however, he became totally disabled by the lung cancer. Dr. Zaldivar further stated the miner's coal dust exposure played no role in his disability since all tests and examination findings were normal prior to the development of the lung cancer. Therefore, he concluded coal workers' pneumoconiosis did not play any role in them miner's death nor did it hasten the miner's death (EX 6).

Finally, on July 7, 1999, Dr. G. Fino, also highly qualified as a pulmonary specialist, reviewed the records on behalf of the Employer. Dr. Fino concluded the miner had no clinically diagnosable occupationally acquired pulmonary condition due to coal dust exposure based on: 1) the majority of chest

x-ray readings were negative; 2) the acceptable spirometric tests were normal; 3) the blood gas studies were normal at rest; and 4) there was no ventilatory defect present based on the normal MVV tests. Dr. Fino stated from a functional standpoint, the miner's pulmonary system was normal and he retained the physiologic capacity from a respiratory standpoint to do his last employment, assuming this employment required heavy labor. Dr. Fino noted further, however, the pathological evidence did show the presence of coal workers' pneumoconiosis, however, it was not a level of clinical disease. Dr. Fino stated the miner's death was due to lung cancer with no association with his coal mine dust exposure. Finally, Dr. Fino concluded: 1) there is evidence to justify a diagnosis of simple coal workers' pneumoconiosis; 2) there is no evidence of any respiratory or pulmonary disability; 3) the miner' death was due to lung cancer; 4) the miner's coal mine dust exposure did not cause, contribute to or aggravate the lung cancer; 5) the miner's coal mine dust exposure did not cause, contribute to or hasten the miner's death; and 6) the miner would have died at the same time even if he had no coal mine employment (EX 6).

DISCUSSIONS OF FACTS AND CONCLUSIONS OF LAW

A. Elements of Entitlement to Benefits

This survivor's claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980.[7] Under this Part, a claimant filing for survivor's benefits has the burden of proving by a preponderance of the evidence that the miner's death was due to pneumoconiosis which arose out of his coal mine employment. §718.205(a). The regulations require that an eligible survivor must prove that:

(1) the miner had pneumoconiosis (*see* §718.202);

(2) the miner's pneumoconiosis arose out of coal mine employment (*see* §718.203); and

(3) the miner's death was due to pneumoconiosis as provided by this section.

B. Existence of Pneumoconiosis and Cause of Pneumoconiosis

30 U.S.C. § 902(b) and 20 C.F.R. § 718.201 define pneumoconiosis as a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis, and statutory, or "legal", pneumoconiosis."[8] The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis arising out of coal mine

[7] Because the miner was last employed in West Virginia, the law of the U.S. Court of Appeals for the Fourth Circuit applies. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

[8] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358, 1364 (4th Cir. 1996)(*en banc*); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-15 (3rd Cir. 1995).

employment. 20 C.F.R. § 718.201(a)(1). In addition, "legal pneumoconiosis" includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The claimant has the burden of proving the existence of pneumoconiosis. The regulations provide the four means of establishing the existence of pneumoconiosis by: (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304[9] or application of the presumptions for certain death claims found in 20 C.F.R. §§ 718.305 and 718.306[10] or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a). Pneumoconiosis must be proved by a preponderance of the evidence, and the fact-finder must weigh all types of relevant evidence together to determine whether the miner suffers from this disease. *See Penn Allegheny Coal Co. v. Director, OWCP,* 114 F.3d 22 (3rd. Cir. 1997).

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence.[11] 20 C.F.R. § 718.202(a)(1). "[W]here two or more x-ray reports are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985). (Fact one is board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP,* 16 B.L.R. 1-31, 1-37 (1991). Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).[12]

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[9] There is no medical evidence of record of a diagnosis of complicated pneumoconiosis. The claimant thus cannot establish existence of complicated pneumoconiosis pursuant to subsection 718.304.

[10] This claim was filed after January 1, 1982 and the miner died after March 1, 1978. The claimant, therefore, cannot establish existence of pneumoconiosis pursuant to subsections 718.305 or 718.306.

[11] There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis. *See* N. LeRoy Lapp, "*A Lawyer's Medical Guide to Black Lung Litigation,*" 83 W. VA. LAW REVIEW 721, 729-731 (1981). Cited in *Lisa Lee Mines v. Director*, 86 F.3d 1358, 1359 n.1 (4th Cir. 1996)(*en banc*).

[12] *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 310 n.3 (3rd Cir. 1995). A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading x-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to x-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993).

Of the five x-ray readings of record of three separate x-rays, only four readings meet the criteria set forth in § 718.102. Of these four readings, all were negative for pneumoconiosis. Thus, based upon the consistent negative readings by highly qualified physicians as well as by physicians with no special qualifications, I find that the x-ray evidence does not support a finding of the existence of coal workers' pneumoconiosis pursuant to § 718.202(a)(1).

Pneumoconiosis may be established under subsection 718.202(a)(2) when a biopsy or autopsy conducted in compliance with §718.106 finds pneumoconiosis is present. As noted above, Dr. Haung, who performed the initial pathological review of the lung slides obtained during the left thoractomy in March, 1997, reported anthracosis in the lymph nodes and the lungs. Other physicians agreed these changes were present on review of the lung slides and, thus, pneumoconiosis was present pathologically. These review reports which agreed pneumoconiosis was present include reports by Drs. Kleinerman, Hutchins, and Caffery, all highly qualified as board certified pathologists and reports by Drs. Castle, Zaldivar and Fino, all highly qualified as pulmonary specialists. The only medical report which disagreed with the conclusion that mild simple pneumoconiosis was present pathologically was the report of Dr. Naeye. As noted above, Dr. Naeye found evidence of anthracosis, but he concluded the anthracotic micronodules were not present in sufficient degree to meet the criteria of pneumoconiosis. While Dr. Naeye's report reached a different conclusion from the other medical reports of record, he does agree that some changes are present pathologically which reflect exposure to coal mine dust. After considering all the medical reports, I find Dr. Naeye's conclusions are outweighed by the other probative and persuasive medical reports of record which lend strong support to each other. Based on the persuasive pathology report as supported by the other pathological review and medical evidence review reports of record, I find the presence of pneumoconiosis is established under the provisions of subsection 718.202(a)(2).

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation’s coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c). Since the miner had ten years or more of coal mine employment, he would be entitled to the benefit of the rebuttable presumption. Because the miner has proved more than 10 years employment in the coal mines, he is entitled to the rebuttable presumption. There being no evidence offered to the contrary to rebut the presumption, I find that the deceased miner's pneumoconiosis arose out of coal mine employment.

C. Death Due to Pneumoconiosis

In order to prevail on her claim for survivor's benefits, the claimant must establish that the miner’s death was due to coal workers’ pneumoconiosis. 20 C.F.R. §718.205. Section 718.205(c) provides that death will be due to pneumoconiosis where the medical evidence establishes that the miner’s death was due to pneumoconiosis, or where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the miner’s death was caused by complications of pneumoconiosis; or where the presumption at §718.304 [complicated pneumoconiosis] is applicable. The

regulations also state that survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. Furthermore, the regulations provide that pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens them miner's death. The record contains no evidence of complicated pneumoconiosis which would enable Claimant to invoke the presumption at Section 718.304. Therefore, the miner's death was not "due to" pneumoconiosis pursuant to §718.205(c)(3).

The medical evidence clearly establishes the direct cause of the miner's death was the lung cancer as noted on the death certificate. All the physicians who discussed the cause of the miner's death agreed that the lung cancer was the direct cause of his death. Therefore, the miner's death was not "due to" pneumoconiosis pursuant to §718.205(c)(1).

The evidence is also clear, however, that pneumoconiosis was not a substantially contributing cause or factor leading to the miner's death nor did pneumoconiosis hasten the miner's death. All the physicians agreed that the pneumoconiosis present pathologically was too mild to have caused any change in pulmonary function prior to the development of the lung cancer. The reports also agreed that pneumoconiosis did not cause, contribute to or hasten the development of the lung cancer. These repots cited extensive medical literature and authorities in support of their conclusions that coal mine dust exposure is not related to the development of lung cancer. Great weight is accorded to the medical opinion reports which are in agreement that the miner's mild coal workers' pneumoconiosis did not cause, contribute to, or hasten his death which was due to lung cancer.

There are no medical opinion reports which contradict the findings of the physicians that although both the fatal lung cancer and pathological coal workers' pneumoconiosis were present, there is no relationship between these two pulmonary conditions. As noted above, the medical reports establish the presence of mild simple pneumoconiosis pathologically, but they also establish this pneumoconiosis was too mild to have caused, contributed to or hastened the miner's death. Since I find the medical and pathological reports insufficient to establish that the miner's death was caused by, contributed to by, or hastened by pneumoconiosis, I find Claimant has not satisfied her burden of demonstrating death due to pneumoconiosis by a preponderance of the evidence under subsection 718.205(c)(2) or (c)(5).

D. New Regulations

By Order dated February 14, 2001, the parties were ordered to submit briefs to address whether the new regulations published by the U.S. Department of Labor ("DOL") on January 19, 2001 affect the outcome of this matter. Employer and the Director, OWCP have responded. Employer argues that the new regulations at 20 C.F.R. §§ 718.201(c), 718.204(a) and 718.205(d) could affect the criteria used to evaluate this claim.

The new language for section 718.201(c) states the "for purposes of this definition, pneumoconiosis is recognized as a latent and progressive disease which first may become detectable only after the cessation of coal mine dust exposure." 65 Fed Reg. at 80048. Employer argues that this change alters the definition of pneumoconiosis in a significant way. The Director, however, argues that this regulatory definition has

been expressly recognized in the United States Court of Appeals for the Fourth Circuit, citing *Eastern Associated Coal Corp. v. Director, OWCP*, 200 F.3d 250, 258-59 (4th Cir. 2000). As noted above, however, all physicians except one agreed pneumoconiosis was present pathologically. Thus, this potential change in the definition of pneumoconiosis is not applicable to this case and, therefore does not affect the outcome of this matter.

Employer contends that changes in § 718.204(a) could affect this claim. Specifically, this regulation provides that a miner's non-pulmonary or non-respiratory condition or disease shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. In this matter, there was no allegation the miner had a non-pulmonary or non-respiratory condition or disease. Accordingly, Employer's contentions regarding § 718.204(a) are without merit.

Finally, Employer contends that changes in § 718.205(d) must be considered to have potential to affect the outcome of this case if the changes in this regulation shift the burden of proof. In contrast, the Director contends the language of section 718.205(d), as revised, is identical to the prior version with the exception of updating the cross-references following the "*See*" at the end of the section. The Director contends this technical revision will have no bearing on the outcome of this case. Upon review of §718.205(d), I find no basis for Employer's contention that it shifts the burden of proof in this matter. Accordingly, Employer's contentions regarding §718.205(d) are without merit.

Since the regulations noted by Employer will not affect the outcome of this case, this claim shall not be stayed on the basis of the new regulations pursuant to the Preliminary Injunction Order, No. 1:00CV03086, as issued by the United States District Court for the District of Columbia on February 9, 2001.

E Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for representation services rendered to him in pursuit of his claim.

CONCLUSION

The claimant has not established that the miner's death was due to pneumoconiosis as required by § 718.205(c). Thus, the claimant is not entitled to survivor's benefits under the Act and applicable regulations.

ORDER

It is ordered that the claim of MARTHA R. WARD, widow of Donald E. Ward, for survivor's benefits under the Black Lung Benefits Act is hereby DENIED.

A
RICHARD A. MORGAN
Administrative Law Judge

RAM:CB:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 22013-7601**. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.